IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
October 16, 2001 Session

JOHN HOPKINS d/b/a RICHLAND CREEK SOD FARM v. POLO DEVELOPMENT, L.L.C., ET AL.

Appeal from the Chancery Court for Knox County
No. 128153-2 Daryl Fansler, Chancellor

FILED OCTOBER 30, 2001

No. E2001-01331-COA-R3-CV

The sub-contractor plaintiff filed a lien against property owned by Gettysvue Partners, L.P., and leased to Polo Development, L.L.C. Kilmers, Inc., had contracted with Polo Development to construct a golf course thereon, and subcontracted with the plaintiff to supply sod for the course. The plaintiff was discharged by Kilmers and claimed a balance owing of $190,278.41. A performance bond had been posted by Kilmers as general contractor, a copy of which was filed by Gettysvue Partners pursuant to Tenn. Code Ann. § 66-11-142(b)(1) for the purpose of discharging the lien. The plaintiff consequently did not sue out the attachment required by Tenn. Code Ann. § 66-11-126. Two years after the complaint was filed the court ruled that the bond was ineffective because the insurance company was not licensed in Tennessee. Gettysvue Partners filed a motion for summary judgment because the plaintiff failed to sue out an attachment. The motion was granted. We affirm.

Tenn. R. App. P. Appeal as of Right; Judgment of the Chancery Court Affirmed

WILLIAM H. INMAN, SR. J., delivered the opinion of the court, in which HERSCHEL P. FRANKS and D. MICHAEL SWINEY, J.J., joined.

Harold E. Bishop, Maryville, Tennessee, for the appellant, John Hopkins d/b/a Richland Creek Sod Farm.

Celeste H. Herbert, Knoxville, Tennessee, for the appellee, Gettysvue Partners, L.P.

OPINION

Facts and Pleadings

At times material, Gettysvue Partners, L.P. [Gettysvue], owned land which it leased to Polo Development, L.L.C. [Polo], for the purpose of constructing a golf course thereon. Polo contracted

with Kilmers, Inc. [Kilmers], to construct the golf course, which, in turn, contracted with the plaintiff to supply and install the required sodding.

The plaintiff filed a Notice of Lien on August 15, 1995 that pursuant to a contract with Kilmers, he provided labor and materials for sodding of the value of $189,748.00 which was due and payable.

On September 20, 1995, Gettysvue (the owner) filed a document entitled "Filing of Bond to Discharge Filed and Unfiled Liens" in the Registers office of Knox County, specifically referencing the Notice of Lien filed by the plaintiff.

On November 3, 1995, the plaintiff filed a complaint against Gettysvue (Owner), Polo (Lessee), Kilmers (General Contractor) and Berkston Insurance, A.V.V., who posted the performance/payment bond on behalf of Kilmers. He alleged that Kilmers contracted with Polo to construct a golf course on described property owned by Polo[1], and that Kilmers as general contractor, contracted with him, as a subcontractor, to supply materials and labor for sodding. He alleged nonpayment,[2] and sought a foreclosure of the lien. No attachment was issued.

Polo, Kilmers, and Berkston filed a joint answer, admitting the *pro forma* allegations but denying that the plaintiff had or was entitled to have a lien on the property of Gettysvue.

Gettysvue filed a separate answer, cross-claim, and third party complaint. It admitted that Berkston is the surety on the payment and performance bond, but denied that the bond was procured by Gettysvue, which affirmatively pleaded that the complaint failed to state a course of action against it. By way of cross-claim, Gettysvue alleged that it leased the land to Polo which developed a golf course thereon, contracting with Kilmers for that purpose, and that Polo or Kilmers procured a performance/payment bond from Berkston. Gettysvue alleged that when it received the Notice of Lien, it recorded a copy of the bond to discharge the lien and that "[t]his court has found heretofore that these bonds do not meet the requirements of TCA § 66-11-142 and hence the lien remains on the property." The cross-claim and third party complaint sought judgment over against the co-defendants if "a lien was allowed against the Gettysvue property."

On October 10, 1997, Gettysvue sold and transferred the property. On October13, 1997 the Chancellor held that the bond filed to discharge the lien was defective because the obligor was not licensed in Tennessee. Gettysvue filed a motion for summary judgment on the ground that no attachment had issued within the prescribed period. On May 4, 1999, the Chancellor ruled that "the lien of the plaintiff was arguably reinstated in October 1997 when the Bond was declared invalid and that the plaintiff should have had an attachment issued at that time." The motion was granted and

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[1] An inadvertence, since Polo was the Lessee, not the owner.

[2] The plaintiff was discharged for allegedly unsatisfactory performance of the contract. A portion of the consideration had apparently been paid.

Gettysvue was dismissed from the litigation. The plaintiff appeals and presents for review his formulated issues. Review is *de novo* on the record with no presumption of correctness. There are no contested issues of fact. See ***Byrd v. Hall***, 847 S.W.2d 208 (Tenn. 1993).

The issues propounded by the plaintiff are reproduced verbatim:

> I. Was Hopkins, after filing his Notice of Lien, prevented from attaching Gettysvue's property by Gettysvue's filing of a bond to discharge lien?
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> II. Did the trial court err by holding that Hopkins' lien was reinstated two (2) years after the filing of the lien notice and also err by granting summary judgment for Gettysvue because Hopkins did not attach the property two (2) years after filing his notice of lien?
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> III. Should Gettysvue be permitted to profit by its own wrong in filing an invalid bond and thereby leave Hopkins with no security in contravention of the mechanics' and materialmen's lien laws?

Analysis

Tenn. Code Ann. § 66-11-115(a) provides:

> (a) Every journeyman or other person contracted with or employed to work on the buildings, fixtures, machinery, or improvements, or to furnish materials for the same, whether such journeyman, furnisher, or other person was employed or contracted with by the person who originally contracted with the owner of the premises, or by an immediate or remote subcontractor acting under contract with the original contractor, or any subcontractor, shall have this lien for such work or material. . . ."
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> (b) Within ninety (90) days after the demolition and/or building or improvement is completed, or the contract of such laborer, mechanic, furnisher, or other person shall expire, or such person is discharged, such person shall notify, in writing, the owner of the property on which the building is being erected or the improvement is being made, or the owner's agent or attorney, if the owner resides out of the county, that the lien is claimed.

> (c) The lien shall continue for the period of ninety (90) days from the date of the notice in favor of such subcontractor, journeyman, furnisher, mechanic or laborer, and until the final termination of any suit for enforcement brought within that period.

Tenn. Code Ann. § 66-11-126 provides for the enforcement of the liens:

> Liens under this part *shall be enforced by attachment only*, in manner following:
>
> . . .
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> (2) Where there is no such contract, by attachment in a court of law or equity in like manner; or before a court of general sessions, having jurisdiction based upon like affidavit, the writ of attachment to be accompanied by a warrant for the sum claimed, to be served upon the owner and may, within the discretion of the plaintiff or complainant, be served upon the contractor, or subcontractor in any degree, with whom the complainant is in contractual relation, but the owner shall have the right to make the contractor or subcontractor a defendant by cross-action or cross-bill as is otherwise provided by law; . . .

In 1974 the Legislature ameliorated the statutory scheme with the enactment of a provision to discharge the property lien by the posting of a bond. Tenn. Code Ann. § 66-11-142 provides, as material here, that:

> (a) If a lien, other than a lien granted in a written contract, is fixed or is attempted to be fixed by a recorded instrument under this chapter, any person may record a bond to indemnify against the lien. Such bond shall be recorded with the register of deed's of the county in which the lien was filed. Such bond shall be for the amount of the lien claimed with corporate surety authorized and admitted to do business in the state of Tennessee and licensed by the state of Tennessee to execute bonds as surety, and such bond shall be conditioned upon the obligor's satisfying any judgment that may be rendered in favor of the person asserting the lien. The bond shall state the book and page or other references and the office where the lien is of record. The recording by the register of a bond to indemnify against a lien shall operate as a discharge of the lien. After recording the bond, the register

shall return the original bond to the person providing the bond. The register shall index the recording of the bond to indemnify against the lien in the same manner as a release of lien. The person asserting the lien may make the obligors on the bond parties to any action to enforce the claim, and any judgment recovered may be against all or any of the obligors on the bond.

(b)(1) When a general contractor has provided a valid payment bond for the benefit of potential lien claimants, a copy of that bond may be filed, in lieu of the filing of another bond, to discharge a lien. A copy of such bond may, at the contractor's option, be filed with the county clerk in lieu of the bond provided in subsection (a), to discharge a lien. Upon filing with the clerk, the contractor shall notify the surety executing the bond and the lien upon the property shall be discharged.

(2) The bond filed pursuant to this subsection shall:

(A) Be in a penal sum at least equal to the total of the original contract amount;

(B) Be in favor of the owner;

(C) Have the written approval of the owner endorsed on it;

(D) Be executed by:

(i) The original contractor as principal; and

(ii) A corporate surety authorized and admitted to do business in this state and licensed by this state to execute bonds as surety;

. . . .

As stated, a copy of the bond was filed by Gettysvue to discharge the lien. The plaintiff apparently assumed that the bond was sufficient for the purpose and made no objection.

The bond was procured by Kilmers, the general contractor, then known as Partners and Associates, Inc.[3] The bond was invalid *ab initio*,[4] but the plaintiff assumed its validity and consequently did not seek an attachment. The defendant argues that it was the duty of the plaintiff

[3] The authority of the *owner* under Tenn. Code Ann. § 66-11-142(b)(1) to file a copy of the bond, for the purpose of discharging a lien, is not questioned. We note this point in light of the language of the statute which may authorize only the *general contractor* to file a copy of the bond in the office of the county clerk, as contrasted to the register's office. The statute was later amended to eliminate the requirement that a copy of the bond must be registered in the office of the county clerk. It should also be noted that the statute requires the copy of the bond to have the owner's approval endorsed on it. Gettysvue's approval does not appear on the copy.

[4] It was the plaintiff who broached the subject of the invalidity of the bond about two years after it was filed.

to review the bond to determine whether it complied with the statutory requirements. In light of the fact that the bond *prima facie* was issued by a company situated in Aruba, with a registered office in Florida, and an agent in Michigan, we agree with the defendant that these circumstances should have motivated the plaintiff to sue out an attachment, thereby focusing judicial emphasis on the effectiveness and worth of the bond. While the plaintiff argues that he was concerned about the incurrence of liability for the wrongful suing out of an attachment, there is no support for this argument in the record. We conclude that the plaintiff was not prevented from suing out the attachment as he argues.

II.

The statutory scheme makes no provision for the procedure to be employed in the event the bond is not initially valid.[5] In the case at Bar, the bond was *prima facie* suspect, thus inviting non-reliance on it, or, at least, timely enquiry. Whether the trial court erred in ruling that the lien was "arguably reinstated" at the time it was judicially declared invalid is irrelevant because the plaintiff never attempted to attach Gettysvue's property. In our view, the filing of an invalid bond is tantamount to not filing a bond, and the lien was not discharged. Since no attachment was issued within 90 days, Tenn. Code Ann. § 66-11-115, the lien became unenforceable. ***Brumit v. Garybeal Glass Co.***, 609 S.W.2d 521 (Tenn. Ct. App. 1980); ***Eatherly Const. Co. v. DeBoer Const. Co.***, 543 S.W.2d 333 (Tenn. 1976); ***Christian and Sons v. Nashville P.S. Hotel***, 765 S.W.2d 754 (Tenn. Ct. App. 1988); ***Gen. Elec. Supply Co. v. Arlen Realty and Dev. Co.***, 546 S.W.2d 210 (Tenn. 1977); ***Vulcan Materials Co. v.Gamble Const. Corp.***, 2001 WL416752 (Tenn. Ct. App. 2001).

III.

The plaintiff next essentially complains of the inequity which he argues is inherent if Gettysvue is permitted to file an invalid bond to bring about a discharge of the lien. At the outset, it is well to keep in mind that the bond was procured by the general contractor, and that Gettysvue merely filed a copy of it. If the bond is invalid as to the plaintiff, it was invalid as to Polo and Gettysvue, and for that matter, as to the general contractor. In effect, all suffered, or were jeopardized, except Berkston, which presumably enjoyed a substantial premium. We are cited to no case which allows the intervention of equity to intrude upon the lien statutes, but, even so, we would be hard-pressed to weigh the respective equities. It was the general contractor who procured the invalid bond, as we have seen; but the at-Bar controversy is between a sub-contractor and the owner, each of whom was inattentive as to the bond.[6]

Although not presented as an issue, the plaintiff in his brief argues that since Tenn. Code Ann. § 66-11-142(a) authorizes any person to record a bond to indemnify against the lien, the

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[5] Tenn. Code Ann. § 66-11-142(b)(1) requires the filing of a *valid* bond, thus implicating a right to question its worth. Neither does the statute address the issue of the bond becoming worthless during the pendency of litigation.

[6] The First Tennessee Bank, N.A. was an additional obligee under the bond. It is not a party to this litigation.

Chancellor should have required Gettysvue to post a "new" bond in default of which the lien would not be discharged. The issue of whether the Chancellor had the authority to *require* the posting of a bond by the owner aside, (since such action is not authorized by the lien statutes), it begs the question because an attachment must issue within 90 days of the Notice of Lien. Strict compliance is required because "[a] materialman's lien is altogether statutory, and where the lawmaking body prescribes the terms upon which it may be asserted, it is beyond the power of courts to waive its provisions or substitute others." ***McDonnell v. Amo***, 34 S.W.2d 212 (Tenn. 1931): ***Vulcan Materials Company v. Gamble Const. Co.***, 2001 WL416752 (Ct. App. 2001).

The judgment granting summary judgment is affirmed. Costs are assessed to the appellant and his sureties. The case is remanded for all appropriate purposes.

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WILLIAM H. INMAN, SENIOR JUDGE